'UN-REPORTABLE'

* **HIGH COURT OF DELHI AT NEW DELHI**

+ RFA No.95/2005

Date of decision : 4th July, 2007

HOTEL EXCELSIOR PVT. LTD. ..... Appellant
! Through : Mr. Harish Malhotra Senior Advocate
Mr. Rajender Aggarwal and
Mr. S.P. Behl Advocates.

Versus

$ MR. N.N. RAINA ... Respondent
^ Through : Nemo
%

CORAM:
HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MS. JUSTICE ARUNA SURESH

(1) Whether reporters of local paper may be allowed to see the judgment?

(2) To be referred to the reporter or not?

(3) Whether the judgment should be reported in the Digest ?

Aruna Suresh, J (Oral)

1. In the present appeal, the appellant has challenged the judgment and decree dated 4th January, 2005 passed by learned Additional District Judge, Delhi whereby the suit of the appellant for mandatory and permanent injunction was dismissed as not maintainable. The plaintiff (appellant herein) took over Hotel Kanishka and Kanishka Shopping Plaza 19, Ashoka Road, New Delhi owned by India Tourism Development Corporation Ltd. (hereinafter referred to as “ITDC”) by way of an agreement dated 25.11.1986 executed between ITDC and

M/s. Hotel Excelsior Pvt. Ltd, the appellant herein. The defendant (respondent herein) was allowed to use Shop No.12, Ground Floor, Kanishka Shopping Plaza as a licensee by ITDC. After the transfer of Kanishka Shopping Plaza to the appellant, the licence of the respondent for the suit premises, was deemed to have been granted by the appellant. Appellant permitted the respondent to carry on his business as a licensee for three years w.e.f. 25th November, 1986. This period expired on 24th November, 1989. Thereafter the licence was not renewed but the respondent failed to vacate the suit premises and continued to occupy as an unauthorized occupant. Appellant issued a Legal Notice dated 12th March, 2003 calling upon the respondent to vacate the premises and not to re-enter the same. However, respondent continued to use the premises. Both the parties put their locks on the premises and when the respondent failed to vacate the premises, the appellant filed a suit for mandatory injunction for issuing a direction to the respondent to hand over the vacant and peaceful possession of the suit premises with a relief of permanent injunction for restraining the respondent from entering in the suit premises and for arrears of damages.

2. Despite service of process respondent failed to appear in the court and contest the suit, hence he was proceeded ex-parte vide order dated 8th October, 2004. Even, in this appeal

the respondent was duly served on 4th August, 2006 by way of publication in the newspaper 'Statesman'. Despite service of process, he did not appear in the Court and contest the present appeal.

3. Learned trial judge dismissed the suit of the appellant as not maintainable with the following observations:-

> "The record file shows that the case of the plaintiff company in Plaint is that by using force defendant has been illegally utilizing the licensed premises. Plaintiff company put one lock on the shutter of the shop. One lock on the shutter has been put by the defendant. This fact shows that defendant is in possession of the suit premises. In other words, admittedly plaintiff is not in possession of the said premises. Accordingly, I am of the considered view that plaintiff company should have filed a suit for possession and not a suit for mandatory and permanent injunction. Further, I am of the considered view that Suit for damages is a connected relief. Thus, the suit of the plaintiff for mandatory and permanent injunction and also for damages is not maintainable".

4. Learned counsel for the appellant has urged that since the respondent was a licensee, the Suit for mandatory injunction seeking possession of the Suit premises and for permanent injunction for restraining respondent to enter into the suit premises is maintainable. It is not disputed that appellant has claimed the relief of possession of the Suit

property by way of a mandate. Ordinarily, therefore, appellant should have filed a suit for possession and permanent injunction for the reliefs as claimed. However, where plaintiff has paid the ad valorem Court fee for the relief of mandatory injunction, appellant can succeed to seek possession of the Suit property to which he might be found entitled after trial. Even in a suit for mandatory injunction if the licensor of the property approaches the court without inordinate delay it may entitle him to the discretionary relief of mandatory injunction. However, where licensor approaches the court after a considerable time, he is not entitled to discretionary relief of permanent injunction and in that case he has to file a suit for possession.

5. In **"Milka Singh v. Diana" AIR 1964 J&K 99,** it was observed :-

> "After the termination of the licence, the licensee is under a clear obligation to surrender his possession to the owner and if he fails to do so, we do not see any reason why the licensee cannot be compelled to discharge this obligation by way of a mandatory injunction under Section 55 of the Specific Relief Act. .....
>
> Where a licensor approaches the court for an injunction within a reasonable time after the licence is terminated, he is entitled to the injunction. On the other hand, if the licensor causes huge delay the court

> may refuse the discretion to grant an injunction on the ground that the licensor had not been diligent, and in that case the licensor will have to bring a suit for possession which will be governed by Section 7 (V) of the Court fees Act".

6. In **"Sant Lal Jain V. Avtar Singh", AIR 1985 SC 857,** wherein a similar question arose, it was held :-

> "In the present case it has not been shown to us that the appellant had come to the court with the suit for mandatory injunction after any considerable delay which will disentitle him to the discretionary relief. Even if there was some delay, we think that in a case of this kind attempt should be made to avoid multiplicity of suits and the licensor should not be driven to file another round of suit with all the attendant delay, trouble and expense. The suit is in effect one for possession though couched in the form of a suit for mandatory injunction as what would be given to the plaintiff in case he succeeds is possession of the property to which he may be found to be entitled. Therefore, we are of the opinion that the appellant should not be denied relief merely because he had couched the plaint in the the form of a suit for mandatory injunction".

7. In the present case, respondent was a licensee and it was his duty to handover the possession of the property to appellant on receipt of the notice which he failed. Therefore, appellant is entitled to claim possession of the suit property. Appellant has also paid ad valorem Court fee for mandatory injunction which is required to be paid under Section 7 (V) of

the Court Fees Act for a suit for recovery of possession of property.

8. Therefore, we are of the opinion that the approach of the trial court was not correct when it dismissed the suit of appellant solely on the grounds that since the relief for possession was claimed, suit for mandatory injunction was not maintainable. The Learned trial judge has not discussed the merits of the case while deciding the suit of the plaintiff.

9. Hence, we hereby set aside the judgment and decree dated 4th January, 2005 passed by the learned Additional District Judge, Delhi. The case is remanded back to the trial court with the directions to decide the suit on merits as per law.

10. Appellant is directed to appear before the Trial Court on 17th August, 2007. Appeal stands disposed of with the abovesaid directions.

A.K.SIKRI, J

JULY 4, 2007 **ARUNA SURESH, J**
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